

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

**FILED
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**U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE**

UNITED STATES OF AMERICA * Case No. 13-CR-00607 (JFB)
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 * Long Island Federal
 * Courthouse
 * 814 Federal Plaza
v. * Central Islip, NY 11222
 *
PHILLIP A. KENNER, et al., * October 28, 2020
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TRANSCRIPT OF CRIMINAL CAUSE FOR
ORAL ARGUMENT TELEPHONE CONFERENCE
BEFORE VISITING JUDGE JOSEPH F. BIANCO

APPEARANCES:

For the Plaintiff: MADELINE M. O'CONNOR, ESQ.
 DIANE C. LEONARDO, ESQ.
 U.S. Attorney's Office EDNY
 610 Federal Plaza, 5th Floor
 Central Islip, NY 11722

For the Defendant, MATTHEW W. BRISSENDEN, ESQ.
Phillip A. Kenner: Matthew W. Brissenden PC
 666 Old Country Road, Suite 501
 Garden City, NY 11530-2004

For the Defendant, SANFORD TALKIN, ESQ.
Tommy C. Constantine: Talkin, Muccigrosso & Roberts LLP
 40 Exchange Place
 18th Floor
 New York, NY 10005

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APPEARANCES (Cont'd):

For the Interested Party,
Danske Bank:

GEORGE KOSTOLAMPROS, ESQ.
XOCHITL S. STROHBEHN, ESQ.
DOREEN MARTIN, ESQ.
KELLY WEINER, ESQ.
Venable LLP
1270 Avenue of the Americas
New York, NY 10020

For the Interested Party,
Owen Nolan:

SEETHA RAMACHANDRA, ESQ.
Proskauer
Eleven Times Square
New York, NY 10036

For the Interested Party,
Ken Jowdy:

KEVIN M. MULRY, ESQ.
THOMAS MCSOUTHER, ESQ.
620 Eighth Avenue
New York, NY 10018

1 (Proceedings commenced at 2:10 p.m.)

2 THE CLERK: Calling case no. 13-criminal-607, the
3 United States of America vs. Phillip A. Kenner and Thomas C.
4 Constantine.

5 Counsels, please state your appearances for the
6 record.

7 MS. O'CONNOR: For the government AUSA Madeline
8 O'Connor and Diane Leonardo. Good afternoon, Your Honor.

9 THE COURT: Good afternoon.

10 MR. BRISSENDEN: Good afternoon, Your Honor. Matt
11 Brissenden, standby counsel for Mr. Kenner. Unfortunately, I
12 don't believe we have Mr. Kenner on the line.

13 THE COURT: Okay.

14 MR. TALKIN: Your Honor, Sam Talkin for Mr.
15 Constantine, who is on the line.

16 THE COURT: Good afternoon to both of you.

17 MR. TALKIN: Thank you.

18 MR. CONSTANTINE: I'm sorry. I'm here, Your Honor.
19 Tommy Constantine.

20 THE COURT: Good afternoon, Mr. Constantine.

21 DEFENDANT CONSTANTINE: Good afternoon, Your Honor.

22 THE COURT: And we have -- for the bank?

23 MR. KOSTOLAMPROS: Yes, Your Honor. George
24 Kostolampros of Venable, along with my colleague, Xochitl
25 Strohben, Doreen Martin and Kelly Weiner. Good morning, Your

1 Honor -- or good afternoon, Your Honor.

2 THE COURT: And we have Mr. McSouther and Mr. Mulry.

3 MR. MCSOUTHER: Yes. Good afternoon, Your Honor.

4 Yes, this is Tom McSouther on the line.

5 MR. MULRY: And Kevin Mulry. Good afternoon, Your
6 Honor.

7 THE COURT: Good afternoon.

8 And then we have Ms. Ramachandra for Mr. Nolan?

9 MS. RAMACHANDRA: Yes, Your Honor. This is Seetha
10 Ramachandra for Mr. Nolan.

11 THE COURT: Good afternoon. We have Mr. and Mrs.
12 Peca.

13 MS. PECA: Hi. Good afternoon, Your Honor.

14 MR. PECA: Good afternoon, Your Honor.

15 THE COURT: Good afternoon. Mr. Kaiser.

16 MR. KAISER: Yes, Judge. Good afternoon.

17 THE COURT: Good afternoon. Mr. Wolinsky?

18 MR. WOLINSKY: Yes, Your Honor. I'm here. Good
19 afternoon.

20 THE COURT: All right. Good afternoon.

21 And is there a Mr. Main?

22 MR. MAIN: Yes, Your Honor. Steve Main on behalf of
23 CSL Properties.

24 THE COURT: Good afternoon.

25 So as you know, this is scheduled for the oral

1 argument on the cross motions for summary judgment filed by
2 the government and Danske Bank in connection with the
3 ancillary proceedings related to the forfeiture.

4 I know that there are other -- Mr. and Mrs. Peca
5 sent me a letter which I don't think has been docketed yet but
6 requested an opportunity to speak today which I will grant and
7 I also received counsel for Mr. Nolan's letter.

8 So once I'm done with the argument, I will give
9 anyone who has made an appearance today an opportunity to say
10 anything they wish to say in connection with this particular
11 motion/motions.

12 Mr. Brissenden, with respect to Mr. Kenner,
13 obviously the forfeiture with respect to him was done as part
14 of the sentencing. I'm glad that you're on the call. And if
15 he wants a copy of this transcript, I will, you know,
16 authorize that under CJA. And if in the future it relates to
17 the ancillary proceedings he wants to be on the call to listen
18 as Mr. Constantine is doing, I have no issues with that and
19 I'll make the government arrange that. Okay?

20 MR. BRISSENDEN: Thank you, Your Honor.

21 THE COURT: All right. All right.

22 So even though there are cross motions, I'm going to
23 have the counsel for the bank go first. And then obviously
24 we're not going to have two rounds of arguments. You should
25 address the government's cross motion at the same time.

1 Obviously, I think all the legal and factual issues overlap,
2 so I don't think that should be an issue.

3 I would also say I've obviously read all the papers.
4 Please don't go through every last argument and fact that's
5 contained in the papers. I would prefer if both sides just
6 highlight anything they want to highlight from their papers.
7 I do have questions for both sides. All right?

8 So, Mr. Kostolampros, you can go first.

9 MR. KOSTOLAMPROS: Thank you, Your Honor.

10 Your Honor, at its core here, Your Honor, Danske's
11 claim is straightforward. It is claim of a financial
12 institution that has a secured interest in property, and it
13 obtained that interest first in acquiring amid another
14 financial institution's interest claimants. And then too,
15 loaning millions of additional documents.

16 Yes, Danske's interest, initial interest arose from
17 a sophisticated repurchase agreement, but the underlying facts
18 here are not dissimilar than any other case involving property
19 subject to a loan and its secured interest.

20 The government seeks to manufacture a genuine issue
21 of material fact by challenging literally every aspect of
22 Danske's claim and disparaging Danske, its lending, its
23 employees, all part of the government's zeal to wipe Danske of
24 its interest in whole in an effort to obtain some funds back
25 to get some funds back to the victims.

1 Now, Danske's empathetic to the victims, but the
2 government seeks to deprive Danske of its rights in creating a
3 new class of victim in Danske and its shareholders.

4 This is simply not the law and cannot be more
5 unjust, especially considering that without Danske's support
6 of the resort property for the number of years that Danske has
7 held its interest, there is no doubt that the resort property
8 would not have been developed as it is today.

9 Now, getting to Danske's claim, it's made up of
10 facility A, which amounts to \$96.4 million. That amount is
11 directly tied to the original Lehman loan of \$107 million,
12 facility B of 18 million, facility C of 14.1 million, a profit
13 participation fee of \$50 million that originally is tied back
14 to unpaid capitalized interest under that original Lehman
15 loan. And then unpaid interest and fees which are
16 accumulating at a default interest rate that at our
17 calculation at this time is about \$24 million.

18 Now, Your Honor, all of that is set forth in the
19 documents that we've provided, Exhibit 57 and Danske's
20 exhibits 91, 92 and 93. And let me add the unpaid interest
21 isn't 24 -- 29 million.

22 Now, getting to the standard in establishing Danske
23 as a bona fide purchaser for value under 21 USC Section
24 853(n), there's three aspects of that. A legal interest in the
25 property, acquired as the bona fide purchaser for value, and

1 was reasonably without cause to believe that the property was
2 subject to forfeiture. Danske has established all of those
3 elements.

4 Your Honor, the government takes issue with Danske's
5 lending claiming that its lending practices weren't
6 appropriate and somehow claims that Danske's obtaining a
7 windfall. This is patently incorrect. Danske paid for
8 Lehman's interest, a \$107 million loan and its secured
9 interest and then lent millions more.

10 The effective interest rate that Danske charged on
11 the commercial loan after 2009 was under six percent. To put
12 that into comparison, Lehman charged 15 percent. And to put
13 this into context, this is a loan for a Mexican resort
14 property in Cabo San Lucas.

15 Surely any lender would categorize this as a high
16 risk loan requiring a higher interest rate, but Danske charged
17 a more than reasonable effective rate of under six percent
18 through the lifetime of the loans.

19 Now, let's get to the government's arguments here.
20 The government argues that Danske has not provided any
21 evidence of when or how or how much Danske paid for its
22 interest. But that simply ignores the underlining MRA, the
23 repurchase agreement, in which Danske's interest arose from.
24 There was \$800 million of value that Danske provided.

25 The government again ignores the Bank of New York

1 letter, which is dated September of 2008, that lists out the
2 resort property loan as part of the -- called the pool of
3 assets that were collateral assets under the MRA. The face
4 value of the loan in that Bank of New York letter is \$107
5 million, Your Honor.

6 The government also ignores the underlying
7 settlement agreement, the documents submitted by Lehman and
8 Danske in the settlement -- I mean, in the Lehman bankruptcy
9 -- and the ultimate settlement order, court order, approving
10 of the settlement allowing for Danske to acquire all of
11 Lehman's interest. This is determinative that Danske provided
12 value for the underlying Lehman loan, Your Honor.

13 So as to subsequent loan amounts, Danske has also
14 pleaded the time and circumstances of those acquisitions and
15 the value it has provided. Let me go through some of those.

16 16 million of new funding to facility B in March of
17 2009. Four million of new funding in January of 2010. Two
18 million from facility B to facility C. Three million of new
19 funding to facility B in April 2013. And then ultimately
20 consolidating original facility C and B into a replacement
21 facility C and advancing ten million of new funding.

22 You know, both parties agreed that Danske has
23 advanced at least 98 million to the borrower to develop the
24 resort party since Danske acquired Lehman's interest. The
25 government's consultant acknowledges that.

1 Now, Your Honor, the government rests its argument
2 that Danske has not established its interests in these new --
3 in these additional loans and additional funds advanced purely
4 on its argument that Danske argued that it need not establish
5 that it acquired a new security interest after it purchased
6 the initial security interest.

7 But the fact that Danske made that argument does not
8 defeat that these new additional advances under the amended
9 loan agreement stand on their own and that our secured
10 interest is established under those loan agreements.

11 Your Honor, I'll stop there as to the government's
12 argument as to value and legal interests and move forward to
13 Danske had no reason to know the property was subject to
14 forfeiture.

15 First, as to the initial loan, the government does
16 not provide any evidence that suggests there was any cause for
17 Danske to have known of any forfeiture prior to September
18 15th, 2008. All of the government's articles and civil
19 complaints are dated after that purchase.

20 Second, as to the subsequent loans, the fact that
21 the government did not list the property as subject to
22 forfeiture until its second bill of particulars along with the
23 Second Circuit's determination in *U.S. v. Walker*
24 (indiscernible). The government did not include the resort
25 property in its indictment, nor at the time of trial, nor on

1 the initial bill of particulars. It was not included until
2 August of 2015. That is after every loan agreement between
3 Danske and the borrower.

4 Again, Your Honor, this is just simply determinative
5 that there is no basis to argue that Danske was not a bona
6 fide purchaser for value without knowledge.

7 Now, the government argues that advances made by
8 Danske subsequently after the August 2015 are -- do not meet
9 that standard. But, Your Honor, those advances were made
10 pursuant to facility C, which was entered into in April of
11 2014, Your Honor.

12 Danske's obligated to advance those funds. And
13 there's no basis for Danske to cease advances. The only basis
14 would be an actual event of default and that did not happen
15 until much later, Your Honor. That didn't happen until 2018,
16 at the end of 2018 when facility C wasn't paid off.

17 The other argument that the -- and I'm looking --
18 the government's essential argument can be boiled down into
19 they want to get money here to victims. And again we're
20 empathetic to the fact that the government wants to get
21 victims funds here, but at the end of the day, that does not
22 mean it has a right to deprive Danske of its legal interests.
23 It's just simply against the forfeiture laws.

24 And what the government does knowing very well that
25 forfeiture wouldn't allow for this it raises this judicial

1 estoppel argument. And essentially what it's arguing here is
2 that there's some windfall to Danske. That is simply not
3 correct.

4 Danske acquired Lehman's loan fully, all agreements
5 written in 2008, Your Honor. Danske has amassed millions of
6 additional funds.

7 Essentially what the government is trying to do is
8 wipe out and rewrite those agreements, make all of those loans
9 basically wipe any interest that would be -- interest that's
10 required under the terms of those loan agreements and any
11 other terms within those agreements away. That's not the law.

12 And the notion that Danske is somehow obtaining a
13 windfall here is just -- is just simply incorrect. It's
14 purely the government's contrived argument.

15 Danske advanced millions of dollars over what now is
16 over 12 years. The government ignores that those funds could
17 have been used elsewhere, but weren't. There's simply no
18 profit on the sale of Danske's allowed claim here too. Danske
19 ultimately sold its claim in bankruptcy to Goldman Sachs at a
20 discount, Your Honor.

21 Let me add that the government uses also its
22 consultant to seek to manufacture a material issue of fact.
23 At its heart, the government's consultant's declaration raises
24 no dispute. It's either -- the government's consultant is
25 either wrong on many of her claims, either irrelevant or

1 simply immaterial.

2 First, she raises differences between Trimont's
3 statements and Danske's statements. As explained in our
4 papers, those are simply irrelevant. Statements were not
5 meant or required to be identically the same reports of
6 transactions as the same.

7 And ultimately, Your Honor, the government's
8 consultant also acknowledges that Danske's debt is over \$98
9 million and acknowledges that facility A's and facility B's
10 principal balances are the same.

11 Your Honor, the government's cross motion should be
12 denied. On its face, the government's cross motion should be
13 denied because Danske's motion should be granted.

14 The government in its cross motion has not raised
15 any issue that would satisfy showing that the government
16 itself wins as to Danske's claim. Essentially what the
17 government does here is simply arguing that Danske does not
18 satisfy, at least at this point, summary judgment standard.

19 But again, Your Honor, our point is this. Is that
20 Danske has satisfied summary judgment motion standards. It
21 has established its claim. The government has not raised any
22 material issue of fact in dispute. I'll stop there, Your
23 Honor.

24 THE COURT: Yeah. Let me ask you some questions.

25 And I know -- you have to bear with me because I

1 know your ultimate point is that some of these things I'm
2 going to ask you aren't necessary for you to establish your
3 claim, but I just want to make sure I understand why there may
4 or may not be documentation for particular things that the
5 government has pointed out. So if you can just bear with me.

6 And I'm not a corporate lawyer, never been a
7 corporate lawyer, so some of these very complicated
8 transactions may not -- you know, I may not understand every
9 aspect of it, but as you know, they make a big point about the
10 fact that there is no documentation.

11 Obviously, the master repurchase agreement was
12 entered into in 1999 and the acquisition of the initial loan
13 took place after that, because it didn't exist at the time of
14 the MRA, which is obviously fine, but they point out the lack
15 of any documentation as to when, like the specific date, and
16 how and for how much the acquisition of that particular loan
17 was made.

18 So can you just help me understand what, you know,
19 is there no such documentation for that? I understand -- I'm
20 going to ask them about the Bank of New York document and what
21 happened in the bankruptcy, so I understand all that, but I
22 just want to understand why there may not be documentation for
23 that of that type of detail.

24 MR. KOSTOLAMPROS: Sure, Your Honor. And the
25 declaration of Jovan Atkinson, who is a long term counsel at

1 Danske, helps explain this.

2 Under the MRA, the collateral pool of assets changed
3 over every week. Every week there would be a changeover in
4 the assets.

5 And the reason why we have not produced a document
6 that shows that listing of the assets, Your Honor, is because
7 frankly we're talking about documents that are 12 years old,
8 and just simply we haven't produced and we haven't found it
9 yet.

10 But that's the only reason, Your Honor, that it's
11 not there. But ultimately it's irrelevant. The point is is
12 that all that matters -- because the collateral pool of assets
13 could have changed, you know, every week.

14 What mattered is what was in the collateral pool of
15 assets as of the event of default which was September 15th,
16 2008, which is what's set forth in the Bank of New York
17 letter.

18 Once Bank of New York was advised and given notice
19 that Lehman had defaulted, then what was operable is what was
20 included in the pool assets as of that date. And that's what
21 the Bank of New York letter shows.

22 And not only that, the bankruptcy proceeding, the
23 submissions in the bankruptcy proceeding which -- bear with
24 me, Your Honor, I think it's Exhibit 32 in our submission --
25 sets forth clearly, I mean, it's listed in the exhibits of

1 that submission in the bankruptcy court that the collateral
2 pool of assets included the \$125 million original loan from
3 Lehman.

4 THE COURT: All right. So then when they point to
5 the MRA saying there will be a written -- I understand, you
6 know, that the collateral had been moving constantly, but they
7 point out the agreement suggests that there be a written
8 confirmation of each transaction in the custody agreement
9 between Lehman and the bank and the trustees. There's
10 apparently a reference to a transaction file that would
11 contain similar information.

12 So you're just saying that you're not fully aware
13 that those documents exist at this point. Is that fair or is
14 that not fair?

15 MR. KOSTOLAMPROS: That's fair, Your Honor.

16 THE COURT: Okay. And then you were talking about
17 the bankruptcy. But again I'm just going to ask you -- I know
18 your argument is it doesn't legally matter, but I just want to
19 understand whether or not such a document existed or not.

20 They point out that when -- in the bankruptcy itself
21 there were a number of commercial loans that were sort of
22 valued together I guess without any individual assignment of
23 value to this particular loan and they point to the absence of
24 any appraisals or valuations within the bankruptcy.

25 So what's your response to that?

1 MR. KOSTOLAMPROS: Yeah. Our response is, Your
2 Honor, there were competing valuations that were provided and
3 that's set forth in the government's Exhibit 3, which is a
4 document Danske produced, and it's a document that sets forth
5 the various valuations that the competing sides had come up
6 with, being Danske and Lehman Brothers. And, Your Honor,
7 that's set forth in government Exhibit 3.

8 As we mentioned, when we produced the various -- we
9 produced valuation documents. We didn't produce all of them
10 that the government asked for because we produced what was in
11 our records. Remember this is going back to 2008. And under
12 that government Exhibit 3, you'll see that there's various
13 asset loan values attributed to each specific loan, including
14 Cabo San Lucas.

15 Now, Danske submitted a value of 33.7 million and
16 Lehman submitted a value of 58.49 million. And remember,
17 those valuations were submitted to ascertain how much Lehman
18 still owed Danske under the loan agreement. Right? That's
19 what it was. It was to set forth the deficiency claim.

20 THE COURT: All right. I'm moving now to the issue
21 of what the -- well, before I get to that, the issue of
22 whether or not the later additional loans were at arm's
23 length. You did address that in your papers and a few moments
24 ago, but I just want to make sure that I understand again what
25 you're relying on.

1 In terms of whether or not the money that was
2 advanced actually went back into the resort, you're relying on
3 Mr. Delvin's role in reviewing all that documentation to make
4 sure that it was not being diverted. Is that accurate?

5 MR. KOSTOLAMPROS: That is, Your Honor. And look,
6 at the end of the day, Your Honor, the government, you know,
7 wants this ancillary proceeding to be about -- to make this
8 into a much bigger proceeding and to how the developer used
9 the funds, Your Honor, and that's not what an ancillary
10 proceeding as to a financial institution's claim is about
11 here.

12 Your Honor, the fact that the resort is developed
13 and the government -- remember, the government just months ago
14 argued that the value of the resort was above Danske's then
15 claim of \$190 million. Where do they think that value came
16 from? I mean, the value came from the amounts that Danske and
17 Lehman loaned.

18 THE COURT: All right. And in terms of what the
19 bank was or was not aware of with respect to any possible
20 fraud over time, the individuals who would have been -- I see
21 that you did produce some due diligence reports as we had
22 talked about months ago. In fact, there's three different
23 documents. The government says there's no reference to the
24 civil litigation or any of these issues that they're raising.
25 But you're essentially saying that I guess Mr. Daniels and/or

1 Mr. Hughes were involved in that, but just not on the radar
2 screen. Is that --

3 MR. KOSTOLAMPROS: No. No, Your Honor. We've told
4 you -- I mean, you told the government, and we acknowledged,
5 is look, the government should assume that Danske was aware of
6 the litigation that was out there. But that does not put
7 Danske on notice of the potential forfeitability of the
8 resort.

9 And the cases that we think -- that we've cited to
10 are dispositive of this, Your Honor. *U.S. v. Watts*, you know,
11 is a case where an attorney submitted a claim and the
12 government argued that the claim couldn't be valid because the
13 attorney couldn't be a bona fide purchaser because the
14 government actually sought forfeiture. And the government --
15 and the attorney knew that.

16 Now, the attorney was relying on a *Monsanto* hearing
17 where the court said, look, you know, we're not going to seize
18 the underlying funds at this point. Now, the government said,
19 look, if we were arguing at that point that the funds should
20 be forfeited, the attorney was surely on notice.

21 Here, we don't even have that the government was
22 arguing that. Remember, as you're fully aware, I mean, the
23 indictment didn't even include the resort property. The bill
24 of particulars, the initial bill of particulars didn't even
25 include the resort property.

1 There's simply no indication that Danske should have
2 known more than the government itself that the resort property
3 was subject to forfeiture. And what the government's trying
4 to do is put some duty of investigation on Danske beyond its
5 due diligence, Your Honor, and that's not what the law is.

6 And, Your Honor, I'll refer -- we cited to this case
7 -- *U.S. v. Peters*. And it's helpful because it directly
8 disputes the -- the government made a similar argument and the
9 court there, citing to the Seventh Circuit decision as well to
10 a Third Circuit decision, says look, that's not what Section
11 853(n) is meant to do. It's actually meant to protect
12 innocent purchasers and not require them to have a duty to
13 investigate whether the underlying property was subject to
14 forfeiture to the extremes that the government is asking for
15 here.

16 THE COURT: All right. But I guess my -- I
17 understand all that.

18 But on terms of what the documentation that you
19 provided, if, in fact, obviously the litigation was on "the
20 radar screen of the bank," the question would be why is there
21 not a due diligence report reflecting some investigation of
22 those lawsuits as to whether or not they were problematic.

23 You're suggesting that the absence of such
24 documentation may suggest that there's more out there that the
25 bank did that has not been produced.

1 And I cite Mr. Hughes' Fortune Magazine comment
2 about having done due diligence so I guess that's the
3 question.

4 If, in fact, the bank was aware of the civil
5 litigation and presumably did some due diligence with respect
6 to that litigation, why isn't there some report reflecting
7 that?

8 MR. KOSTOLAMPROS: Sure, Your Honor.

9 I mean, look, at the end of the day, there is no due
10 diligence report on that. But, again, as we've said, that's
11 simply not enough to say, look, because of the allegations
12 made in the underlying press reports or in the litigation
13 that's simply not enough to put Danske on notice.

14 THE COURT: I understand that. But if there was
15 some investigation done and the bank became aware of more than
16 what was out in the public domain, newspapers or wherever
17 else, that could potentially be problematic, right?

18 MR. KOSTOLAMPROS: Yeah. But the government hasn't
19 shown more. All the government's shown is the litigation that
20 it submitted and the article, Your Honor. And we submit that
21 that alone -- assuming Danske knew about that -- is not
22 enough.

23 What more could the government -- Danske have done
24 to investigate when the government itself didn't bring a
25 forfeiture action that included the resort property even after

1 it indicted the defendants?

2 THE COURT: All right. Again, I'm just going to
3 focus you one more time on what my question is.

4 They're entitled to at least some basic discovery to
5 determine whether the bank knew more than what was in the
6 allegations, the civil allegation, and/or newspaper articles,
7 and that's why I've urged you to produce any such due
8 diligence reports that were done. But I just want to make
9 sure --

10 MR. KOSTOLAMPROS: Your Honor, I'm saying --

11 THE COURT: You don't have it?

12 MR. KOSTOLAMPROS: There's nothing else.

13 THE COURT: All right. All right.

14 And then my last question before I hear from the
15 government is -- I just wanted to make sure I understood what
16 was in your papers and what you said here today about the
17 advances that took place after the bill of particulars was
18 filed, you're suggesting that those were pursuant to, you
19 know, the agreements that had already been entered into,
20 correct?

21 That there were no -- the government said that you
22 entered -- the bank entered into the second amended, and third
23 amended, and I guess restated loan agreement, after the bill
24 of particulars. I just want to make sure --

25 MR. KOSTOLAMPROS: Sure.

1 THE COURT: -- is that correct or not correct?

2 MR. KOSTOLAMPROS: Yes, Your Honor.

3 THE COURT: So that is correct?

4 MR. KOSTOLAMPROS: Let me go back, Your Honor. Hold
5 on.

6 THE COURT: All right.

7 MR. KOSTOLAMPROS: Which modification are you
8 talking about?

9 THE COURT: They said the second amendment to the
10 third amended and restated loan agreement was entered into
11 after the government filed the bill of particulars. I don't
12 know how much money then was advanced.

13 MR. KOSTOLAMPROS: Yes. That wasn't a new form of
14 funding, Your Honor. That was simply, if my recollection is
15 correct, to move out ultimately the payment date. There was
16 no new funding on that.

17 THE COURT: All right. And you're saying -- so
18 every dollar that was advanced after the bill of particulars
19 was pursuant to contractual obligations that already existed
20 and that the bank could only refuse if there was a default of
21 some type, is that your position?

22 MR. KOSTOLAMPROS: Yes, Your Honor. Up until
23 December of 2018 -- December 31st, 2018. And I'll go back and
24 look at my records, but at that point in time, facility C was
25 either fully advanced or near full advancement.

1 THE COURT: All right. And then the last -- I said
2 the last question, but I had one more -- I just want to make
3 -- again, this was in your papers, but the government points
4 out that there obviously are numerous other third-party
5 petitions and suggest that the Court's decision on this
6 motion, these motions, should await addressing those other
7 petitions I guess simultaneously. And your response is that
8 they're in a different position than the bank?

9 MR. KOSTOLAMPROS: Yes, Your Honor. Our response is
10 that we hold the most -- the senior secured position here.
11 And that's something that Your Honor could determine at this
12 point based on what the other interests are. The other
13 interests here are equity interest which all sit below the
14 Danske secured interest.

15 THE COURT: All right. All right. Thank you.

16 All right. I'll hear from the government.

17 MS. O'CONNOR: Thank you, Your Honor. The
18 government's motion papers assert numerous grounds for denying
19 Danske's motion for summary judgment, granting the
20 government's motion for summary judgment, and dismissing
21 Danske's petition.

22 But the primary grounds of granting the government's
23 motion and dismissing Danske's petition is that Danske has not
24 met its burden of pleading and substantiating that it
25 purchased the DCSL loans.

1 There's nothing in Danske's petition or motion
2 papers that demonstrates that on a specific day Danske
3 purchased the loan for a specific amount of money.

4 And the evidence shows that if such a purchase had
5 occurred there would have been documentation to prove it.
6 There would have been documents showing when Danske bought the
7 loan, the amount of money it paid for the loan, and the amount
8 of money Lehman would have paid to repurchase it. (Inaudible)
9 based on Danske's unsupported conclusory assertion that it
10 purchased the loan. Danske completely failed to meet its
11 burden of proving that it provided sufficient value for the
12 loan (indiscernible) transaction.

13 As we sit here today, no one knows, with perhaps the
14 exception of Danske, how much Danske paid for the loan in the
15 purchase transaction and how much the loan was valued at
16 during the Lehman bankruptcy settlement decision.

17 And (indiscernible) it hasn't shared its knowledge
18 with the Court, the United States (indiscernible), and the
19 other third-party petitioners. The Court should, therefore,
20 draw a strong inference that the facts do not support Danske's
21 claims that it was a bona fide purchaser for value.

22 The facts do show that Danske ignored the DCSL
23 resort's default and repeatedly extended the loan agreements,
24 charged the resort between a half a million to one and a half
25 million dollars. Most times Danske entered into a modified

1 loan agreement, allowed the resort to pay down the
2 (indiscernible) facilities and then withdraw the same funds so
3 that Danske (indiscernible) new funds and knew that the resort
4 could never repay the ever growing debt.

5 By inducing that conduct, Danske was receiving
6 interest payments and fees at an exponential rate and
7 systematically depleting the equity in the resort.

8 (Indiscernible) this court (indiscernible) make more
9 than a \$216 million profit -- (indiscernible) 20 percent
10 profit in this forfeiture proceeding.

11 This is not a situation where the Court assumes that
12 Danske (indiscernible) values and the government has the
13 burden of disproving that assumption.

14 This is a situation where Danske, as a third-party
15 petitioner that wants its interest to be recognized, has the
16 burden of coming forward with proof that it is the bona fide
17 purchaser for value that was reasonably without cause to
18 believe that the property was subject to forfeiture. Danske
19 has not established any of these elements.

20 In sum, Your Honor, Danske has failed to adequately
21 plead the time and circumstances of the acquisition of its
22 purported interests and failed to substantiate that it
23 acquired a valid interest in the resort as a bona fide
24 purchaser for value that was reasonably without cause to
25 believe that the property is subject to forfeiture.

1 And, therefore, it's petition must be dismissed.
2 The government's motion for summary judgment be granted and
3 its motion be denied.

4 THE COURT: Well, let me ask you some questions.
5 This issue of the lack of a date with respect to the
6 acquisition of the (indiscernible) loan, I'm having a hard
7 time with your suggestion that in the absence of such a date
8 that they have no interest.

9 I'm just -- there's no question that there was
10 consideration, hundreds of millions of dollars, for the
11 entrance into the master repurchase agreement, right?

12 MS. O'CONNOR: Actually, Your Honor, there is a
13 question. The master repurchase agreement contemplated future
14 purchases of commercial loans up to the amount of \$800
15 million.

16 THE COURT: Right.

17 MS. O'CONNOR: It did not specify that this loan
18 would be included. And there's no evidence that, in fact, it
19 was purchased.

20 THE COURT: But what about --

21 MS. O'CONNOR: Besides we don't even have --

22 THE COURT: The Bank of New York sent a letter that
23 detailed this, that they had purchased it under the MRA and
24 valued it at \$107 million on September 15th of 2008. What's
25 wrong with that document?

1 MS. O'CONNOR: Your Honor, that doesn't say that
2 that's what the -- it's saying that the face value of the loan
3 itself. It doesn't demonstrate that it was purchased or for
4 any amount of money.

5 And the fact of the matter is Lehman's records -- I
6 mean, Danske's reply papers point out that this pool of loans
7 was constantly changing and that Lehman had the opportunity to
8 swap out loans.

9 So under those circumstances, it's entirely unclear
10 if the loan was crossed out before it was purchased or crossed
11 out after the fact and was inadvertently included in the list
12 from the trustee.

13 Without any actual proof of a purchase on a certain
14 date for a certain amount of money, we don't know for sure
15 that this loan was purchased.

16 THE COURT: All right. In January of 2009, there
17 was an assignment and assumption agreement which confirmed
18 that they had acquired this interest in the resort for good
19 and valuable consideration. So you think that document is
20 wrong too?

21 MS. O'CONNOR: It's a conclusory document based on
22 the assertions of Lehman and Danske (indiscernible) document.

23 THE COURT: On the basis of who?

24 MS. O'CONNOR: Of Lehman and Danske. However --

25 THE COURT: Why would Lehman be agreeing to that if

1 that wasn't true? Why would they do that?

2 MS. O'CONNOR: It's entirely possible it was
3 inadvertent considering the number of loans at issue and the
4 fact that it wasn't a receipt. Perhaps Lehman did not pay
5 attention to the fact that this was crossed out accidentally
6 at some point in time. (Indiscernible) certainly an agreement
7 was -

8 THE COURT: And then the bankruptcy court -- the
9 government's position is the bankruptcy court erroneously
10 recognized the bank as the owner of this asset in an October
11 25, 2010 order? The bankruptcy court made a mistake that the
12 bank should not have been recognized as the owner, is that
13 what the government is saying?

14 MS. O'CONNOR: The government's position is that the
15 bankruptcy court did not make any findings of fact, but rather
16 relied on Danske and Lehman's representations in the
17 settlement agreement which is --

18 THE COURT: Isn't it a bankruptcy court's job to
19 make sure that people who are claiming interest in various --
20 in properties in bankruptcy that they are bona fide purchasers
21 of and have a real interest in those assets? Isn't that
22 exactly what bankruptcy courts do?

23 MS. O'CONNOR: In this case, Your Honor, there was a
24 (indiscernible) from all appearances -- and again this is
25 based on the government going through the records

1 (indiscernible) the production from Danske, which it's
2 required to produce to meet its burden, those (indiscernible)
3 indicate that the Court, through a stipulation -- some
4 agreement was submitted and the Court allowed it based on
5 representations by those parties.

6 So it's entirely possible there was a mistake in
7 there and the Court accepted that fact as true.

8 But the government in this case, unlike the
9 bankruptcy case -- Lehman -- Danske has the burden of coming
10 forward and demonstrating the purchase and it has not done
11 that with any concrete evidence. It's just asking the Court
12 to infer based on --

13 THE COURT: I understand. These are all -- all
14 these things are concrete -- these are all documents that are
15 confirming their interest over time.

16 And you just keep speculating that all the documents
17 may be wrong simply because they don't have a particular date
18 on which they acquired, you know, the loan when the nature of
19 the transactions were very fluid. I don't think you can say
20 that they have no evidence.

21 They have a lot of documents suggesting that they've
22 had this interest over a long period of time, that it had been
23 valued, that they paid hundreds of millions of dollars at the
24 start of this relationship to be able to acquire these types
25 of loans, and all you keep saying is that these documents

1 could all be wrong, the bankruptcy court might be wrong, and
2 the government has no -- you have nothing to suggest that any
3 of those things are wrong other than that they can't give you
4 a date that they initially acquired the loan, you know 15
5 years ago.

6 MS. O'CONNOR: Your Honor -

7 THE COURT: So in the absence of a date, no matter
8 how many documents say that they got this interest over time,
9 the Court should ignore all those and say they have no
10 interest --

11 MS. O'CONNOR: Your Honor, it's the government's --

12 THE COURT: -- even though your consultant said that
13 they've advanced \$98 million. You're saying the bank that
14 advanced \$98 million to the resort, right? There's no dispute
15 they advanced \$98 million, right?

16 MS. O'CONNOR: Your Honor, there's no -- well, as to
17 the first part of your question in terms of that there's no
18 documentation, the government's concern is with the fact that
19 Danske, more so than the date, has not shown that it actually
20 bought it for adequate consideration. There is no proof of
21 the consideration.

22 The repo agreement did not say that the amount of
23 money was expended all at once for the pool. The repo
24 agreement contemplated that Danske would be able to purchase
25 up to \$800 million worth of individual separate loans and then

1 Lehman would then repurchase those loans.

2 So each loan was a separate transaction and each
3 loan would then be tallied up to the amount of 800 million.
4 It's entirely unclear how much was given. It could have been
5 one dollar, it might not have been anything. So that's the
6 biggest issue with this loan. They also have to show that it
7 was a purchaser for value and that's what it's unable to do in
8 this case.

9 THE COURT: I still don't understand why Lehman
10 would be in a conspiracy with the bank to say that they gave
11 consideration for this.

12 If, in fact, they didn't, what would be the benefit
13 to Lehman to agree to that and to settle something that they
14 could have argued that the bank had no legal interest in
15 bankruptcy? I don't understand that. What would be the
16 benefit?

17 MS. O'CONNOR: By all appearances --

18 THE COURT: What would be the benefit to Lehman to
19 doing what you're suggesting happened here, that there was no
20 consideration, there was one dollar consideration, there was
21 no consideration, yet Lehman for some unknown reason believed
22 that there was consideration, that it was a valid interest
23 that they needed to settle, and the bankruptcy court approved
24 it?

25 MS. O'CONNOR: Your Honor, Lehman was concerned with

1 resolving the outstanding debt. And, yes, it certainly
2 involved a pool of loans. Whether Lehman scrutinized how much
3 consideration was provided or not, we can only guess.

4 But in this case it's still Danske's burden to show
5 it purchased it for a certain amount of money, this specific
6 loan, rather than the pool. The loan at issue here is the
7 Lehman -- is the resort loan and Danske still has not shown
8 that it bought it for a certain amount of money. And all it
9 can do is ask the Court to infer.

10 Now, we know the documentation would exist. And
11 it's certainly questionable why Lehman -- Danske has come
12 forward with thousands of pages of documents, but the most
13 crucial document hasn't been produced and there's been no
14 explanation for it.

15 THE COURT: So my second --

16 MS. O'CONNOR: There were declarations submitted.

17 THE COURT: My second question was that the
18 government's position is that even though there's no dispute
19 that they (indiscernible) initial, loan that they've advanced
20 \$98 million, that that does not establish a legal interest in
21 the resort, even though it's undisputed that they had advanced
22 \$98 million, that's the government's position?

23 MS. O'CONNOR: Your Honor, the government's position
24 -- the government's position is that that money was already
25 paid back by the resort so there's nothing here for Danske to

1 claim.

2 THE COURT: You're saying it's paid back, but
3 they're saying that the agreements allowed for interest
4 (indiscernible) and that's what banks do and that's what
5 (indiscernible) entitled to. The fact that the dollar amount
6 may have been --

7 MS. O'CONNOR: Your Honor -

8 THE COURT: -- 98 million doesn't mean that the bank
9 doesn't (indiscernible).

10 MS. O'CONNOR: I'm sorry, Your Honor. We're hearing
11 static on our end and we don't know if you're hearing it on
12 your end.

13 THE COURT: Yeah. I'd just ask everyone to mute
14 their lines other than the government. All right. That's
15 better.

16 MS. O'CONNOR: Your Honor, the government's
17 statement that the 98 million was advanced is actually
18 assuming that all of the advances were supported.

19 The inadequacies in the documentation still exist
20 and the government still challenges certain of those advances.
21 But assuming for argument sake that their advances had been
22 supported, then the government's position is that they were
23 nevertheless paid back that amount of money plus six million
24 on top of it, so they haven't suffered a loss.

25 We would point again to the declaration of our

1 expert showing that there are numerous, numerous issues with
2 their proof of these additional advances. And that also
3 (indiscernible)

4 --

5 THE COURT: Well, they said they had -- that their
6 third-party consultant, Mr. Delvin, put in a declaration about
7 what he did over time. They said that they informally I think
8 speak to Mr. Delvin. So why isn't his role sufficient?

9 MS. O'CONNOR: We have not received the full amount
10 of documentation from Mr. Delvin. And in looking at Mr.
11 Delvin's reports, he has said he only reviewed samplings of
12 the paperwork required.

13 THE COURT: So the government thinks in a forfeiture
14 proceeding you're entitled to every penny that was ever spent
15 by that resort and the government should be able to look at
16 that and that should be produced for the government? Do you
17 know how much paperwork you're talking about?

18 UNIDENTIFIED: Millions of pages.

19 THE COURT: You think that's the type of discovery
20 the government's entitled to in a forfeiture proceeding?

21 MS. O'CONNOR: Your Honor, the bank is seeking a
22 \$200 million claim.

23 THE COURT: I would ask whoever is on the line that's
24 not muted to mute their phone.

25 Go ahead.

1 MS. O'CONNOR: Your Honor, it's the bank's burden to
2 come forward with proof that it was a bona fide purchaser for
3 value.

4 And it's the government's position that if it was
5 lending the funds outside the parameter of the loan agreements
6 and the loan agreements required that documentation as a
7 condition precedent to loaning the funds, then that is an
8 indication that these funds, especially when looked at all the
9 other facts in the aggregate, that this was not an arm's
10 length transaction and that they were not a bona fide
11 purchaser for value.

12 THE COURT: All right. And on the last issue about
13 whether they should have had reason to believe the resort was
14 subject to forfeiture, you know, in your papers you -- when
15 they point to the fact that the government in 2013, you know,
16 indicted this case, for two years did not include it in the
17 forfeiture allegations, your response to that I think in your
18 reply was, well, it's not what the government knew, it's what
19 the bank knew.

20 But to the extent that your argument is a
21 reasonable, you know, person, a reasonable bank would have
22 understood this was subject to forfeiture, why isn't it
23 relevant that the government -- notwithstanding the
24 investigation that was done pursuant to the grand jury, with
25 the subpoena power of the grand jury having indicted two

1 people in connection with the fraud related to the resort --
2 did not think there was a sufficient basis to put it in the
3 forfeiture allegations? Doesn't that speak to what a
4 reasonable entity looking at the situation, looking at the
5 civil lawsuits would think?

6 MS. O'CONNOR: Your Honor, as you're well aware, the
7 crimes that were charged did not include the crime involving
8 the funds that went to the resort.

9 The government's investigation was expansive,
10 certainly took a number of years, and the government takes it
11 time rather than -- Danske might learn something much sooner --
12 the government of course as you know is required to do
13 significant investigation and make sure that its position is
14 justified.

15 THE COURT: I was going back to say your position is
16 the government didn't know when it was indicting the case that
17 money had been diverted from Hawaii to Mexico and to the
18 resort? Yet the government is saying that -- I'm a little
19 confused by that.

20 Wasn't that the whole basis for part of the initial
21 indictment, the diversion of the investors' money from Hawaii
22 to Mexico, to various investments in Mexico, right? You're
23 saying --

24 MS. O'CONNOR: The government included the resort
25 when it determined that the resort should be forfeitable

1 property. The government gives general forfeiture allegations
2 in the bill of particulars which would encompass the resort.

3 Later it subsequently added the bill of particulars
4 to give specific notice. But that still -- but the general
5 allegations, it covers any forfeiture that the government
6 might seek. So what requires us to (indiscernible) --

7 THE COURT: So what case do you have anywhere in the
8 history of the United States where an entity like a bank or
9 any similar entity, based upon civil lawsuits that have been
10 filed or articles in a newspaper, has been found to have had
11 reason to believe that they're subject to forfeiture and,
12 therefore, can't recover? Which case?

13 MS. O'CONNOR: Your Honor, the government's pointing
14 to case law of the general proposition that what's relevant is
15 the knowledge that the bank had.

16 And even the Second Circuit case in *Watts*, which was
17 relied upon by *Danske*, involved an attorney where the
18 government was unable to establish probable cause in a
19 *Monsanto* hearing.

20 The Second Circuit nonetheless recognized that if
21 the attorney, in fact, had reason to know the criminal origins
22 of the property, then that attorney would not be considered a
23 bona fide purchaser for value (indiscernible) --

24 THE COURT: I understand that. I understand. I
25 think you heard me asking those questions. But the government

1 in your papers is relying heavily on this idea that the civil
2 litigation should have been sufficient to put them on notice.

3 When in *Watts*, it wasn't sufficient when the
4 government put it in the indictment when there was a *Monsanto*
5 hearing saying they couldn't establish probable cause. And
6 the Second Circuit said in that case that apart from what they
7 may or may have not known on their own, which required some
8 investigation, the simple fact that the government put it in
9 the indictment was not sufficient.

10 Here, we don't even have that, so I'm not sure how
11 *Watts* would support your position.

12 MS. O'CONNOR: Your Honor, in this case, Danske
13 actually was in a unique position to learn about the
14 forfeitability of the resort before the government given its
15 relationship with Jowdy.

16 If Your Honor would recall from the government's
17 filings, that in the civil lawsuit between Jowdy and the
18 hockey players, Jowdy states that Constantine reached out to
19 Danske Bank to point out the conduct of Jowdy. And, in fact,
20 he reached out to Lehman beforehand. And we don't have
21 Danske's due diligence to know what --

22 THE COURT: What else do you want them to produce?
23 They produced -- they said these are the due diligence reports
24 that they have. We just got a representation from an attorney
25 that this is all they have. What more do you want from them?

1 MS. O'CONNOR: Well, they --

2 THE COURT: They don't have any other due diligence
3 reports. They don't have any. So what discovery am I going
4 to give you?

5 MS. O'CONNOR: Your Honor, it's the bank's burden to
6 come forward and show that it didn't have any reason to know.
7 And the government's position is the conclusory statements in
8 the affidavit are belied by the facts here.

9 Jowdy's own civil complaint points out the fact that
10 Danske was notified by Constantine. One of them is a
11 defendant in this case. Peter Hughes told *Fortune* magazine
12 that he engaged in due diligence, yet those records have not
13 been produced.

14 THE COURT: On this issue of continuing to advance
15 the money, obviously, this was occurring over a long period of
16 time.

17 And the government over the past -- since 2015
18 obviously has been heavily involved in what's been going on at
19 the resort. And the bank has pointed out, and you can correct
20 me if I'm wrong, the government never came to court or never
21 came to -- I think never came to the bank and said stop
22 advancing all of that money. You're just depleting the
23 victims' interest in this resort. Why are you continuing to
24 do this?

25 Their argument is that if they had, in fact, done

1 that, the government would have argued that they were
2 depleting the value of the resort and hurting the victims by
3 not continuing to try to keep the resort going.

4 So why didn't the government -- if the government
5 believed that it was inappropriate for them to continue to
6 lend the money to this, you know, venture, why didn't the
7 government say something to me or to them? I don't recall
8 that ever coming up.

9 MS. O'CONNOR: Your Honor, the government told the
10 bank numerous times, and that's in the affidavit of Special
11 Agent Galioto, that it did not deem Danske to be a bona fide
12 purchaser for value for any of the funds advanced after the
13 bill of particulars was filed. It absolutely told Danske that
14 on numerous occasions.

15 THE COURT: When did the government tell the bank --

16 MS. O'CONNOR: (Indiscernible) --

17 THE COURT: When did the government tell the bank to
18 stop -- not whether or not they were a bona fide purchaser for
19 value -- when did the government tell them to stop advancing
20 money to the resort because they were depleting the interests
21 of the victims and the government in this forfeitable asset?
22 When did the government tell them that?

23 MS. O'CONNOR: The government would not tell Danske
24 whether or not to continue to loan funds. That's Danske's
25 decision to do so. However, the facts show it was never

1 advancing any new funds.

2 First of all, the government didn't even know
3 exactly when -

4 THE COURT: When did the government tell -- when did
5 the government tell them to not have Mr. Jowdy continue to
6 manage the company because of issues of fraud and
7 mismanagement? When did the government tell the bank that?

8 MS. O'CONNOR: Your Honor, the government on
9 numerous occasions expressed its concern. In fact, if you
10 recall, we filed a motion to force a protective order to go
11 down to the resort to look at the books and records because of
12 the concern that the money was being funneled out of the
13 resort.

14 THE COURT: And what happened? You didn't come back
15 and tell the Court --

16 MS. O'CONNOR: Your Honor denied the government's
17 (indiscernible) --

18 THE COURT: -- you didn't us. You didn't tell me
19 that you found something that should be of concern.

20 MS. O'CONNOR: Your Honor, the government didn't
21 find anything because the records that were being produced
22 were limited and that was the problem all along.

23 Representations were made that funds were continuing
24 to be advanced by the resort -- by Danske to keep the resort
25 afloat.

1 However, once we finally got the bank's bank records
2 and we're looking at them, we've learned that that's not
3 actually what was occurring.

4 The government did not know that the majority of the
5 equity was being consumed through compounding interest until
6 we hired our consultant and got the records. Upon the
7 commencement of the ancillary proceeding, we did not know what
8 was occurring down there. We only had at best suspicions,
9 Your Honor.

10 THE COURT: All right. And on this issue of whether
11 or not the Court should decide this motion, given the other
12 petitions that have been filed, the bank's position is that
13 they have a superior -- you know, if the Court grants their
14 motion, they have a superior interest and that the other
15 petitions aren't claiming that type of interest, so that
16 there's no reason that the Court would need to await
17 resolution of all those petitions. What are they missing?

18 MS. O'CONNOR: Your Honor, Danske's pushed for an
19 expedited briefing of its motions. The third parties were
20 being noticed while the motions were being briefed.

21 It would be unfair to give priority to Danske's
22 claims when these third-party petitioners have a right to
23 participate and challenge Danske's claims. So it's a question
24 of fairness. And it's the third parties' arguments as to
25 priority in addition to the government's.

1 THE COURT: All right. All right.

2 I'll give the bank a few minutes to respond to
3 anything the government has said.

4 MR. KOSTOLAMPROS: Thank you, Your Honor. Just a
5 couple of points.

6 First, as to the settlement agreement and all the
7 documents of the Court referenced, you know, it bears noting
8 that the U.S. Trustee and the U.S. Trustee's representative in
9 the Lehman bankruptcy never objected.

10 And, look, Lehman's bankruptcy was the biggest, if
11 not one of the biggest, bankruptcies in the world at that
12 time. It just -- it's incredible to think that the Court --
13 the government -- Lehman itself who owed billions of dollars
14 would have allowed Danske to take an asset for a dollar or
15 less. That's just not -- it's just not factually correct.

16 Your Honor, as to the bona fide purchaser status,
17 the government now hinges -- seems to hinge on this
18 conversation that Constantine apparently had with Danske. I
19 mean, even if you look at what the government alleges, what
20 the government alleges is that Constantine disparaged Jowdy.
21 Not that somehow the resort property was subject to
22 forfeiture, Your Honor.

23 And, again, there's just not enough. I mean, the
24 government itself didn't bring an action. And from the
25 government's statements today, didn't even know it had an

1 action at the time of indictment.

2 Surely if it had to take the government two more
3 years to investigate, how is Danske supposed to investigate.
4 At the time of the bankruptcy -- it had to decide at the time
5 of the bankruptcy whether it was going to take this asset or
6 not.

7 And the notion that the asset would have been
8 included in their by some erroneous belief is just -- it's
9 belied by the Bank of New York document that sets forth the
10 amount and the date. They keep saying there isn't an amount
11 and a date. There is. The Bank of New York date is
12 determinative, Your Honor.

13 And then finally, Your Honor, the notion that we
14 need to wait for the additional petitioners' claims, we have
15 those claims. On the face of those claims, the Court can
16 determine that Danske stands ahead of those because those are
17 equity interests, Your Honor.

18 THE COURT: And then on the last issue, there's
19 obviously some dispute about the exact amount of the claim.
20 Your position is that the Court could grant your motion up to
21 the amount that would be undisputed and resolve those issues
22 at some future time, is that your position?

23 MR. KOSTOLAMPROS: That is our position, Your Honor.

24 THE COURT: All right. All right.

25 I'm going to hear from anybody who wants to be heard

1 on this, from those individuals who we recognized at the
2 beginning of the call. So I know --

3 Mr. or Mrs. Peca want to speak?

4 MS. PECA: Sure. If it's our turn, we can go ahead.

5 THE COURT: Yeah.

6 MS. PECA: All right. Well, thank you, Your Honor,
7 for letting us speak today. We'll be brief. But we felt it
8 was necessary for our voices to be heard at this hearing.

9 You've obviously heard a lot from the bank's
10 representation today and at previous hearings, but the victims
11 who happen to be the original investors, the real
12 shareholders, need to be heard too.

13 Basically, as you saw in our letter, we support the
14 government's motion to oppose Danske Bank's claim. As a
15 reminder, Diamante Cabo San Lucas is one of the investments
16 that Phil Kenner had us involved in, one in which he stole a
17 lot of money from us in the form of ownership percentage.

18 A group of hockey players, CSL Properties, put up
19 millions of dollars to start the project and purchase the land
20 and were given only eight percent ownership in return, while
21 Kenner who put exactly zero dollars of his own money into the
22 project assigned himself approximately 40 percent. So
23 millions of dollars from original investors equated to just
24 eight percent while zero dollars somehow got Kenner 40
25 percent.

1 Therefore, we are a claimant through CSL as
2 legitimate and lawful investors -- no one disputes that -- and
3 are hoping to recover our investment and stolen funds.

4 Danske should not be given priority over us original
5 investors as our investment was how this project got off the
6 ground in the first place by purchasing the land well before
7 the bank was even involved.

8 Danske's lawyers mentioned the bank's interest and
9 the shareholders. Well, we are the real shareholders. There
10 would be no project if it weren't for our money along with the
11 other original investors' money.

12 If Danske's claim were to be given priority there
13 likely won't be anything left for us investors. And, again,
14 the hockey players and original investors were the only ones
15 to put their own money into the project via CSL.

16 And it would be yet another massive loss for all of
17 us if Danske's claim were to be given priority over the
18 government's claim.

19 So, Your Honor, our claim and the government's
20 should take priority over Danske's. We don't want to be
21 victimized yet again. Thank you.

22 THE COURT: All right. Thank you, Ms. Peca.

23 Mr. Kaiser, is there anything you want to add?

24 MR. KAISER: Yes, sure. I'd like to add something.

25 Judge, if you can recall my letter on February 28th,

1 2019 I kind of laid everything out of the scams and the
2 corruption, the mismanagement between Ken Jowdy and company,
3 including his attorneys, Fernando Garcia, accountant, Antonio
4 Marques.

5 So when I went down there in 2012 it wasn't long
6 before I caught wind of how he was doing this and -- which was
7 roughly in 2013. I actually audioed, videotaped. I built a --
8 had a chronological order of how he does it, how he works with
9 David Daniels with his close relationship with him. David
10 Daniels and Company staying on site even though for optics he
11 always had a hotel room in town.

12 And if you look at this from a thousand foot view
13 Diamonte sold north of \$500 million in real estate. \$500
14 million in real estate and still in this debt.

15 So in 2014 I sat with Ken Jowdy and said you could
16 pay out this loan. You could pay off this loan doing 60, \$70
17 million in sales a year. It's at \$125 million at the time.

18 And I said you could also take care of all the
19 victims, you know, because everyone -- and I want to say one
20 other thing.

21 Everybody knew that Diamonte could have been
22 forfeited, including Mark Lewinsky and Company and a lot of
23 the members that are on this call because I personally sat
24 with them. I said this is under forfeiture and God willing it
25 will be forfeited because it was our funds that paid for that.

1 So for them to be like woe is me, or babe in the
2 woods is simply not true.

3 And let me say another things because the bank --
4 Danske bank was talking about these checks and balances. Oh,
5 yeah. And a guy by the name of Mike Devlin, who will still be
6 servicing the loan, well, you know, what?

7 You can't service the loan from the sports bar when
8 you're drinking, because he wasn't servicing the loan.
9 Because Jowdy was doing whatever he wanted to do with these
10 funds, including in my letter funding his own companies, or
11 his own house and doing whatever -- there was no checks and
12 balances. And when he redid the loan in 2014 and put the \$50
13 million kicker, that was as per Mr. Jowdy's request. So he
14 alone with the bank were fully aware of what's going on. So -
15 - and just like with the \$98 million, Judge, I was on the
16 ground. No one else on the phone call was actually on the
17 ground going through it.

18 And I was treating it as an investigation, just like
19 I was a police officer, and I was uncovering everything. And
20 then I go to the government and say it's a crime what's going
21 down there. He's stealing millions of dollars. This loan
22 could have been paid off.

23 And at that point that's when Jowdy caught wind of
24 what I was doing, called me in the office and said I had to
25 leave the property ASAP because I was getting into his

1 business and the bank's business. I even had the accountant
2 on tape, Antonio Marques, talking about the criminal activity.
3 And I said if only the FBI knew what Danske and Ken Jowdy were
4 doing.

5 So this whole thing is just laughable with the bank
6 about oh, yeah, all this money. It's going to straight there.
7 It's simply not true. I was the one on the ground.

8 And if you noticed during -- Danske Bank kept on
9 coming up and said oh, yeah. You know, you have to keep Mr.
10 Jowdy. He's an integral part of the project, at the same time
11 saying the project is going bankrupt and making no money. How
12 the hell does that make any sense to anybody?

13 So me being the victim, knowing everything, I was
14 pleading with the government or someone to listen to say get
15 this guy out of here and his family because he's going to
16 steal every single penny. And that's what finally prompted me
17 in 2019 to write that letter, Judge, because I didn't know if
18 you getting the message.

19 So that's why I wrote that and no one questioned it,
20 that it was valid, neither the bank, Mr. Jowdy, nobody did
21 because it was all true and spot on. Thanks for listening.

22 THE COURT: All right. Thank you, Mr. Kaiser.

23 Ms. Ramachandra, do you want to speak on behalf of
24 Mr. Nolan?

25 MS. RAMACHANDRA: Yes, Your Honor.

1 You know, I'd just like to follow up on something
2 Mr. Kaiser said. Unlike him, I wasn't on the ground, but just
3 reading all the papers and all of the facts that have been set
4 forth so far I just find it hard to believe that the bank as a
5 petitioner was without -- reasonably without cause to believe
6 that the property was subject to forfeiture, which is one of
7 the prongs that are necessary to prevail under, you know, the
8 relevant statute here.

9 And the test isn't really whether the property is
10 named in a forfeiture allegation. A forfeiture allegation is
11 to give notice to the defendant that something's being
12 forfeited.

13 You know, the case law in this area actually
14 requires a lot more. You know, third parties should be on
15 notice of newspapers articles. It's not even required that the
16 defendant be indicted sometimes for a third party to be deemed
17 to have knowledge that the property was subject to forfeiture
18 or reasonably subject to forfeiture.

19 I mean, we would ask the government is there a case
20 out there that says this? Well, *BCCI* says it. You know, in
21 that case the defendant hadn't even been indicted, but I think
22 it was American Express Bank or *BCCI* Bank had notice that the
23 property was subject to forfeiture.

24 *Cutters* is another case that comes out the same way.
25 In that case the issue had to do with was loan made -- could a

1 loan still be made at the time a search warrant was being
2 executed in the defendant's house. And that was a question of
3 fact for the court. There's no legal requirement that
4 property needs to be put in a forfeiture allegation before a
5 third party is on notice of it.

6 And, in fact, there are all kinds of reasons why the
7 government fails to pursue forfeitable assets, but that
8 doesn't mean that third parties who have knowledge that the
9 property is subject to forfeiture that there's a nexus between
10 the property and the crime, don't actually have to come in and
11 prove that they don't have that knowledge to prevail as a
12 third party.

13 And so here I mean it seems like there's ample
14 evidence in the record, at least by 2013, by 2014, after the
15 defendants had been indicted, that this property was subject
16 to forfeiture or could be subject to forfeiture. And the facts
17 that Mr. Kaiser laid out support that as well.

18 I would also just address one other point that
19 counsel for the bank made, which is they sort of summarily say
20 that well, the victims here have equity interests and our
21 interests are superior.

22 I mean, that may be in a bankruptcy but in
23 forfeiture general creditors aren't protected, but the victims
24 here aren't general creditors. They have equity interest.

25 So it's not clear to me why the bank's interests are

1 suddenly superior or should be given priority over the victims
2 who also have equity interests, they have real interest in the
3 property, separate from the point I made in my letter which
4 was about any remaining funds could be used for restitution.

5 THE COURT: Well, I just want to go back to your
6 citation to the *BCCI Holdings* case, because I did look at that
7 case.

8 And even if the American Express Bank in that case
9 may have advanced the money, the money before the actual
10 indictment, the district court there had pages, and pages and
11 pages of public documents indicating fraud with respect to
12 BCCI.

13 So I don't think -- you know, I don't know if you
14 can compare Mr. Owens' civil lawsuit and, you know, some
15 articles in the *New York Post* to the level of notice that
16 existed in that case.

17 MS. RAMACHANDRA: I take your point, Your Honor,
18 although I would point out that Danske Bank is a regulated
19 financial institution and I just find it hard to believe that
20 they wouldn't do due diligence when extending millions and
21 millions of dollars in loan proceeds. You know, they say they
22 don't have a memo on that.

23 That may be true, but I still thing there's a
24 question of knowledge here and particularly like what we heard
25 from Mr. Kaiser, I think there are all kind of fact questions

1 here. I mean, at the very least I don't think that this is a
2 case for summary judgment.

3 THE COURT: All right. Thank you.

4 Mr. McSouther and Mulry, is there anything you want
5 to add?

6 MR. MCSOUTHER: Yes, Your Honor, I would.

7 And I'm sorry to take up some of the time. I mean,
8 Mr. Jowdy categorically denies all of those specious
9 allegations by Mr. Kaiser.

10 I mean, it's kind of -- I mean, while they're
11 irrelevant, frankly, to this -- to the decision that is before
12 the court at this point, I just can't let the record go
13 without being corrected.

14 We did not respond to that letter because we didn't
15 want to get into this public back and forth. That was
16 irrelevant to the issue before the court.

17 But, frankly, it's kind of incredible to me that
18 here's a man who in 2009 testified on behalf of Phil Kenner in
19 an arbitration proceeding that was brought by Owen Nolan in
20 which he said that he knew that the loan -- the money was
21 actually a loan to the property in advance of when the money
22 was (indiscernible). And then six years later testifies before
23 Your Honor that he had no idea it was a loan until after the
24 fact. It's just -- it's mind boggling to me --

25 THE COURT: I don't want to get into --

1 MR. McSOUTHER: But in any event -- and that's all
2 I'm going to say to that. But that can't go -- can't be on
3 the record and not have a response to it, Your Honor.

4 You know, the bank has made the argument so I'm not
5 going to -- unless there's anything else that the court has
6 about -- questions for me, then I don't have anything.

7 THE COURT: Let me -- before I -- I was going to
8 hear from Mr. Wolinsky in a minute, but what -- I should maybe
9 ask this to others.

10 What's the status of the resort right now? What's
11 going on with respect to the resort right now?

12 MR. McSOUTHER: Well, right now, Your Honor, the
13 resort is operating on sort of a day-to-day basis. I mean,
14 it's not -- it hasn't been able to pay interest on the loans
15 for years -- two years now. It needs a capital infusion
16 immediately because it's in such a difficult financial
17 position.

18 You know, currently we're coming into what would
19 normally be the high season, but now with the pandemic
20 apparently the threat level in Mexico was just raised to
21 orange, which may have an adverse impact on the ability to
22 bring in -- you know, have people travel there even if they're
23 willing to travel under these circumstances.

24 So it is in a very difficult financial position and
25 it's just trying to operate on a day-to-day basis.

1 THE COURT: All right. Thank you.

2 All right. Mr. Wolinsky?

3 MR. WOLINSKY: Yes. Thanks for hearing me today.

4 Look, at the start, let me say there's no question
5 that I have sympathy for the homeowners and all the other
6 homeowners -- excuse me, for the victims. They're victims of
7 a terrible fraud and many people lost their life savings.

8 The only thing I do want to address is whether this
9 issue can or should be deferred. And from where we sit it
10 should not be deferred.

11 The issue has to be resolved now. I'll legally --
12 Your Honor, I'm not going to lecture you or point you to
13 legalities, but I would like to bring a sense of some
14 commercial reality to this question of whether the issue
15 should be resolved now or later.

16 The project, as you know, has been subject to a
17 cloud for years. That cloud has to be lifted. The forfeiture
18 process contemplates the sale. The objective of the sale is
19 to compensate the victims.

20 In the real world a sale cannot go forward unless a
21 buyer knows whether there's a mortgage on the property and the
22 extent of the mortgage.

23 Deutsche Bank can't lend new money to the project
24 unless it knows that it's a secured lender. No other third
25 party is going to lend money to the project unless it knows

1 that it's -- what its position is going to be in the capital
2 structure. No lender or equity investor in a forfeiture
3 proceeding is going to forward unless they knew whether and
4 the extent of Danske Bank's financial position.

5 When Your Honor asked the question to the
6 government, you know, what's your position? Should it be
7 resolved now or later? Their answer was well others should be
8 permitted to address that. Other victims -- the victims should
9 be permitted to litigate that issue.

10 Your Honor, from where I sit the government is
11 supposed to stand in the position of protecting the interests
12 of the third parties and shouldn't be pointing to the victims
13 to protect their rights.

14 But in this case you have a unique situation. Ms.
15 Ramachandra made a very cogent argument. She's a partner at
16 Proskauer. I respect her arguments and Your Honor has heard
17 from not only the government but from Proskauer on whether the
18 victims have superior rights to Danske Bank.

19 So I think the issue is ripe in hundreds of pages of
20 briefing, an expert forensic affidavit submitted by the
21 government. I think Your Honor has everything in front of you
22 to make this decision and it's now time for a dose of
23 commercial reality to be brought to this case.

24 And, frankly, listening to the government's
25 argument, I've heard a total lack of commercial reality. I

1 mean, I hear them argue that a bankruptcy court order
2 approving an assignment and assumption agreement ten years ago
3 was entered in error or that the Lehman Brothers estate did
4 not know what loans it was assigning over to Danske Bank.
5 That's not how the commercial world works.

6 You heard the government argue that Danske Bank
7 \$98,000 million to support the resort after the fact, but
8 maybe Danske Bank was a stranger to this project and was
9 lending money to a project that it didn't have a secured
10 mortgage to. There's no commercial reality in that argument.

11 Your Honor, the basic point is the secured lenders
12 are secured and come ahead of the equity. If that's going to
13 be up ended in this case, that's fine, but it should
14 (indiscernible) happen now.

15 And let me just make two other person points. One,
16 I can tell you that if Mr. Kaiser had told me that the
17 property was subject to forfeiture and I was buying a lot that
18 was going to be taken out from under me, I wouldn't have
19 bought a lot and I certainly would not have entertained Mr.
20 Kaiser's bid to build a house that I then proceeded to build.

21 And the other thing I would say just in weighing the
22 equities, I respect completely that the victims have put their
23 own money into this resort and have certainly an equitable
24 interest in their position.

25 But obviously, the homeowners have all put their

1 money into the project and our interest is to at end of the
2 day to bring certainty to this proceeding and resolution to
3 this proceeding.

4 So, I guess, Your Honor, my final conclusion is I
5 really urge you to resolve this issue now so that the cloud
6 can be removed and the project can move forward to a
7 settlement, hopefully, maybe naively, or through the
8 forfeiture sale that Your Honor's order of forfeiture
9 contemplates.

10 THE COURT: All right. Thank you, Mr. Wolinsky.
11 Mr. Main, is there anything you want to add?

12 MR. MAIN: Yes, Your Honor, but I'll be short.

13 As it relates to the arguments that have already
14 been made I guess one of the principal questions that I've had
15 in reviewing all of the briefing relating to the cross motions
16 is something that's reflected on page 8 of the reply that the
17 government just filed a couple of days ago.

18 And when it discusses the master repurchase
19 agreement, there's apparently a reference in there that
20 specifically states, "there should be a written confirmation
21 of each transaction," and then there's an enumeration of
22 certain things that that written confirmation should include,
23 including the purchase date, the purchase price, the
24 repurchase date and pricing rate.

25 And then there's also a mention of the custody

1 agreement and the same sort of information should be included
2 in there.

3 So, you know, as it relates to the bank's burden of
4 establishing when it acquired the Diamonte loan and how much
5 it paid for it, I mean, those would seem to be very important
6 documents that I just don't understand why they have not yet
7 been produced.

8 The only other thing I would say is I guess just to
9 echo what Mrs. Peca said. You know, I represent CSL
10 Properties. As the court is aware, there's 14 former NHL
11 players that are the ownership or the membership of CLS
12 Properties.

13 They're the real victims of the crimes that Mr.
14 Kenner was recently sentenced on and they're the ones that
15 contribute at least 2.3 or almost one third of the initial
16 capital that was needed to get this project off the ground and
17 they're very much concerned, Your Honor, that depending on the
18 court's ruling on these cross motions that they may find
19 themselves in a situation where there's no equity to recoup
20 there investment and there's likewise no equity from which a
21 restitution a judgment might be made.

22 So, you know, those are my comments at this time.
23 Thank you.

24 THE COURT: All right. Thank you.

25 I do want to speak to some of the things that I've

1 heard from the property owners and the victims but let me just
2 make sure -- I don't think Mr. Talkin has anything he wants to
3 say. Mr. Talkin, is there anything you want to say today?

4 MR. TALKIN: No. Thank you, Your Honor.

5 THE COURT: All right. So obviously I'm going to
6 reserve decision. I want to go back and look at the papers
7 and the law before rendering a decision.

8 I'll just take a minute about the importance of the
9 timing of this. Obviously, I understand that. I set this down
10 on a very accelerate briefing schedule, even though the papers
11 were quite voluminous. And I scheduled -- I usually wouldn't
12 schedule an oral argument a few days after getting a reply but
13 I did that because I'm very sensitive to the situation that
14 everybody who has an interest in this is in.

15 I just want to -- with respect to some of the things
16 that Ms. Peca said and some of the others, including Mr.
17 Wolinsky and Mr. Main, that obviously, the legal requirements
18 for who has an interest and a security interest are well
19 settled and the court obviously will apply them.

20 But on this issue of sort of the victims and
21 fairness and the equity that they have in the property I think
22 obviously the victims know that the court is highly focused on
23 that, has been from day one, and I don't want to repeat
24 because I know many people have been on -- I don't know how
25 many of these conference and I don't know whether Mr. and Mrs.

1 Peca participated in some of the forfeiture conferences and I
2 don't know whether Mr. and Mrs. Peca participated in some of
3 the forfeiture conference and proceedings.

4 But I have been saying for over two years that
5 everybody has an interest; the bank has an interest, the
6 government has an interest, the victims have an interest, the
7 property owners have an interest, the victims have an
8 interest, the property owners have an interest in sitting down
9 and resolving this issue without being at the point that we're
10 at now, I said that two years ago when this obviously became
11 an issue after the trial.

12 And I said it multiple times. I had a magistrate
13 judge involved at one point to try to get the parties to
14 resolve it. The bank said they wanted to resolve it. I wasn't
15 involved in the settlement discussions but they represented to
16 me in one of the proceedings that they put many millions of
17 dollars on the table to try to resolve it because the
18 uncertainty in and of itself creates a lot of financial
19 ramifications for the bank.

20 So the bank, unless they're operating in bad faith
21 and they're suggesting to the court they're willing to try to
22 do something that they're not has said over and over again we
23 want to sit down with the government and resolve this.

24 When I keep asking the government about that at
25 every proceeding over the past years the government has told

1 me different things at different times about why they were not
2 in a position to do this.

3 And as Ms. Ramachandra noted in her letter, the
4 government does have the discretion to utilize the forfeiture
5 funds and prioritize them to go to the victim rather than the
6 government as a matter of fairness.

7 And I would hope that that would be their intention
8 with respect to any funds that they obtain through this
9 forfeiture, is not to give it to the government but to give it
10 to the victims. That would be my hope, that would be my
11 expectation. But it's obviously -- the court doesn't decide
12 that. The government decides that.

13 But upon urging the government repeatedly to sit
14 down, initially the government told me well, we can't -- how
15 can we sit down with the bank? We don't know the value of the
16 property.

17 And I said well, figure out the value of the
18 property. Do a valuation. Well, you should forfeit the
19 property first. The bank was telling me if I forfeited the
20 property the ramifications economically would not be good for
21 anybody and that made a lot of sense to me.

22 So I was telling the government basically to try to
23 get whatever they would need to be able to resolve this
24 quickly upon the preliminary order of forfeiture, do to
25 everything they needed to do with the bank, in terms of

1 documentation, in terms of an appraisal, get all that in line
2 so that upon the preliminary order of forfeiture this could be
3 resolved very quickly to everyone's benefit, including the
4 victims.

5 The government did its appraisal. The court did
6 sign the preliminary order of forfeiture and then we started
7 having this issue where the government was suggesting -- and
8 the government can point out to me if they ever suggested this
9 to the court, you know, in years that this was being litigated
10 before the preliminary order of forfeiture that -- and when
11 the bank was trying to resolve the case, that the bank is not
12 a bona fide purchaser for value.

13 But because of the civil litigation, they have no
14 legal interest in this -- or they don't have a superior legal
15 interest, they're not a bona fide purchaser of value.

16 I don't recall any of that when we were discussing
17 and trying to resolve this case where the government's
18 position was this is -- this is our problem, Judge. It was
19 about valuing the property so that the government could make --
20 -- which I understand. Make a good determination of whatever
21 offer it is the bank was making versus (indiscernible) the
22 property was of what it would be worth to try to resolve it
23 quickly.

24 So that's where we're at, you know. But I just want
25 the victims to specifically know the court has done everything

1 it can to try to be able to resolve this in a way that allows
2 the money to go to the victims, because that I think is the
3 most equitable think for this to happen.

4 But I don't control the government. The government
5 makes its own decisions about timing and about discretion and
6 about what arguments they're going to make.

7 And they are pursuing this argument, but I would
8 continue for the, I don't know, umpteenth time to encourage
9 the government -- I assume the bank is -- whatever the court's
10 decision on this -- obviously, the uncertainty continues.

11 And so I would assume that the bank continues to try
12 to resolve this matter, and Mr. Kostolampros will correct me
13 if I'm wrong, but I assume the bank stands willing to again
14 sit down with the government (indiscernible)?

15 MR. KOSTOLAMPROS: Your Honor, we would always
16 entertain any offer by the government, but as we said, you
17 know we tried before, Your Honor, and all Your Honor has to do
18 is look at the declaration of the government's consultant and
19 our letter, including an offer that gave, you know, guaranteed
20 funds to the victims.

21 And mind you, that was a lesser offer than the
22 original offer and a significant upside to the extent the
23 government's appraisal was right.

24 But the government we believe wasn't really acting
25 in good faith because we constantly got back -- we can't give

1 you even a preliminary thought on whether we could move
2 forward. All we were asking for -- just give us an initial,
3 you know, view of the government that this could move forward
4 and they wouldn't.

5 And it was all about producing, producing more
6 documents that eventually it became clear to us that they were
7 just trying to challenge every instance of our claim.

8 So my point is this, Your Honor. Yes, we are open
9 to entertain any offer and we've always been. But that
10 shouldn't stop Your Honor from moving forward with --

11 THE COURT: I'm not suggesting -- I'm not going to
12 delay this decision -- that's not my suggestion.

13 But my suggestion is whatever this decision is that
14 the parties should continue to try to work this out, because
15 the continuing litigation is not in anybody's interest. So
16 the value just -- everybody (indiscernible) the value. So
17 that's all I have to say for that.

18 So I'm going to reserve decision --

19 MS. O'CONNOR: Your Honor --

20 THE COURT: Yes.

21 MS. O'CONNOR: The government respectfully would
22 just like the opportunity to respond.

23 Over the years the government has in good faith sat
24 down with the bank and the resort to discuss potential
25 resolutions. It has endeavored to do so at every opportunity.

1 The fact remains that Danske was refusing to produce proof of
2 its claim.

3 The government was very clear about the bona fide
4 purchaser for value status for any funds loaned after the bill
5 of particulars was filed, but did not offer any opinion about
6 the funds that were advanced prior to that time, having not
7 seen any of the documentation.

8 And having finally received some documentation as to
9 Danske claim it's the government's position that Danske's not
10 a bona fide purchaser for value, having failed to show a
11 purchase, particularly consideration -- adequate consideration
12 for the loan.

13 Under these circumstances, the government is not
14 permitted to settle, nor would it be fair to the other third
15 parties or the government to do so. So that is primarily the
16 reason the government has not been able to advance any kind of
17 settlement.

18 It was really due to the bank's refusal to produce
19 proof of it's claim and it's time to force the government to
20 recognize its claim in its entirety and give the priority over
21 the other third-party petitions, which hadn't even been
22 noticed at the time, or the petitioners were -- we were not
23 aware.

24 There were many variables involved, but none of
25 which was government's bad faith or failure to try to reach

1 some kind of resolution.

2 THE COURT: All right. Thank you very much. Have a
3 good -- I appreciate everybody's arguments. Have a good day.

4 (Proceedings concluded at 3:39 p.m.)

5 I, CHRISTINE FIORE, court-approved transcriber and
6 certified electronic reporter and transcriber, certify that
7 the foregoing is a correct transcript from the official
8 electronic sound recording of the proceedings in the above-
9 entitled matter.

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12 _____ October 29, 2020

13 Christine Fiore, CERT

14 Transcriber
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